

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



# 75-7652

In The  
**United States Court of Appeals**  
For the Second Circuit

DONALD M. KINSELLA,

*Appellant,*

*against*

BOARD OF EDUCATION OF THE CENTRAL SCHOOL  
DISTRICT NO. 7 OF THE TOWNS OF AMHERST AND  
TONAWANDA, ERIE COUNTY and EWALD B.  
NYQUIST, COMMISSIONER OF EDUCATION OF  
THE STATE OF NEW YORK,

*Appellees.*

APPEAL FROM ORDERS AND JUDGMENT  
OF THE UNITED STATES DISTRICT  
COURT FOR THE WESTERN DISTRICT  
OF NEW YORK

BRIEF FOR APPELLEE

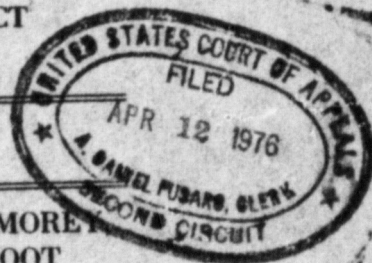
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Daily Record Corporation  
Rochester, New York

(1888)

Spaulding Law Printing  
Syracuse, New York



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Education Law §3020-a (McKinney's Consolidated Laws of New York c. 16). This statute is reproduced at A-235, <u>infra</u> .	3

IN THE UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT

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DONALD M. KINSELLA,

Appellant,

-against-

BOARD OF EDUCATION OF THE CENTRAL  
SCHOOL DISTRICT NO. 7 OF THE TOWNS  
OF AMHERST AND TONAWANDA, ERIE  
COUNTY and EWALD B. NYQUIST,  
COMMISSIONER OF EDUCATION OF THE  
STATE OF NEW YORK,

DOCKET NO.

75-7652

Appellees.

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APPEAL FROM ORDERS AND JUDGMENT  
OF THE UNITED STATES DISTRICT  
COURT FOR THE WESTERN DISTRICT  
OF NEW YORK

---

BRIEF FOR APPELLEE, SCHOOL BOARD

PRELIMINARY STATEMENT

This is an appeal from the decision and order of  
Hon. John T. Curtin, United States District Judge, denying  
plaintiff's motion for supplementary relief, dated October 21,  
1975 and reported at 402 F. Supp. 1155.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Does the motion for supplementary relief state a substantial federal question?
2. Were the amended regulations of the Commissioner of Education properly enacted?
3. Did the School Board comply with these regulations and afford the plaintiff due process of law?



STATEMENT OF ADDITIONAL RELEVANT FACTS

In February 1974, a three judge panel declared Section 3020-a of the Education Law of the State of New York unconstitutional. Kinsella v. Board of Ed. Cent. Dist. No. 7, Erie County 378 F. Supp. 54 (WDNY 1974) The reasons articulated by the Panel were:

1. The statute does not require that the decision of the School Board be based upon the record developed before the hearing panel.
2. The school board is not required to render a written decision setting forth its reasoning and the factual basis for its decision.

The panel directed the defendants to take "appropriate" administrative or legislative action to remedy the constitutional defects in Section 3020-a of the New York State Education Law. Neither party appealed this decision.

Approximately eight days after this decision, the regulations of the Commissioner of Education were amended in response to the direction of the Court for appropriate administrative action. These amendments are reproduced at A-171. They comply in all respects with the decision of the three judge panel in Kinsella, supra.

The regulations provide for:

1. Findings of fact by the panel together with recommendations, if any, as to disciplinary action.
2. A transcript of the hearing.
3. The above are forwarded to the Commissioner of Education and he, in turn, forwards a report of the hearing with a copy of the transcript to the employee and to the Clerk of the Board.
4. Decision of the Board must be based solely on the record.

These regulations were strictly adhered to:

1. On June 21, 1974, the hearing panel made their findings and recommendations. (A-175)
2. A stenographic transcript of the hearing was provided to the plaintiff.
3. On July 24, 1974, the School Board rendered its decision with specific reference to the transcript, exhibits and the panel report. (A-179)



### SUMMARY OF ARGUMENT

1. With respect to the issues of jurisdiction and the validity of the enactment of the amendments to the regulations of the Commissioner of Education, the School Board adopts by reference the relevant portions of the brief of appellee, Commissioner of Education.

2. The action of the School Board was in strict compliance with the regulations promulgated by the Commissioner in order to implement the decision of the three judge panel and afforded the plaintiff due process of law.

POINT I

THE DETERMINATION OF THE SCHOOL BOARD  
COMPORTED WITH DUE PROCESS OF LAW.

Assuming, arguendo, that the amended regulations of the Commissioner of Education were validly enacted, plaintiff contends that the determination of the School Board to dismiss him from employment was:

- (a) an inadequate and insufficient determination, and
- (b) violative of due process of law.

With respect to the first contention, plaintiff argues that the report of the hearing panel and the determination of the Board of Education consists exclusively of conclusory findings. Plaintiff cites United States v. Merz, 376 U.S. 192, (1964) in support of his position that the report of the hearing panel and the determination of the Board is patently defective. This case does not support the proposition proffered by the plaintiff. In Merz, supra, the Supreme Court addressed the inherent danger of a tribunal that "may become free-wheeling, taking the law from itself, unless subject to close supervision." Id. p. 198. The primary concern in Merz, supra, was not that the fact finder "make detailed findings such as judges do who try a case without a jury," but that "the path followed by the commissioners..., ...be distinctly marked." Id. p. 199.

There was no conflict in the evidence presented to

the hearing panel that evaluated the charges against Mr. Kinsella, nor does he raise that contention. The evidence unequivocally established that he engaged in behavior which constituted an overreaction to acts of misconduct by students and his reactions were potentially and actually harmful to the physical well-being of the students. We respectfully submit that the path followed by the hearing panel and the Board of Education is distinctly marked and it is marked by evidence of the overreaction of Mr. Kinsella combined with his assaultive propensities.

There are conclusions contained in both the report of the hearing panel and the determination of the Board of Education, but these conclusions are directly supported by articulated facts which lend themselves inescapably to those conclusions.

The plaintiff further contends that the report of the hearing panel and the determination of the School Board are vague with respect to Specifications two and three of the charges. (A-12-13) The report of the hearing panel does not specifically refer to the names of all three victims of Mr. Kinsella's physical abuse but it does contain a reference to his "extreme overreaction to relatively ordinary acts of misconduct by students,..." (A-175) as well as a direct reference to the "Steven Ulmer incident." (A-175). These references read in conjunction with the original specifications establish the basis for the report of the hearing panel. If the general references raise any question or speculation concerning the basis for the



report of the hearing panel, that question is removed by the determination of the Board of Education which specifically and in a numerical fashion refers to the three incidents outlined in the Specifications.

Plaintiff also objects to the lack of the use of the term "insubordination" in the panel report or in the determination of the Board of Education. The term insubordination, like incompetency, is based on an evaluation of many variables that often make it difficult to articulate the precise formula. The acts of insubordination attributed to Mr. Kinsella are specified in charge number four, referred to in the report of the hearing panel as "extreme overreaction to relatively ordinary acts of misconduct by students, ... intense outbursts... physically severe and potentially harmful." The determination of the Board of Education likewise finds that these actions of excessive physical force were in violation of their district policy and rules. This falls squarely within the course of conduct delineated as insubordination. Furthermore, and more importantly, the charge of insubordination cannot conceivably be attacked as a smoke screen or a cloak which conceals an arbitrary and undisclosed reason for the discharge of Mr. Kinsella.

The assertion that there has been a demonstrable lack of due process afforded to the plaintiff is to ignore the patent facts. Plaintiff has had the benefit of:

- (a) Able and experienced counsel.

- (b) A plenary hearing before an impartial panel with a full right to present evidence, cross examine witnesses and present argument.
- (c) Full compliance with amended regulations of the Commissioner of Education.

Plaintiff relies on the authority of Haymes v. Regan, 525 F. 2d 540 (2d Cir., 1975) to buttress his position that he is entitled to a more comprehensive statement of the reasons for his dismissal. In Haymes, the plaintiff sought the disclosure of the release criteria observed in the parole decisions of the New York State Parole Board. This Court held that such disclosure is not required as part of the minimum due process to be accorded a parole applicant. A statement of reasons was sufficient to satisfy the fundamental due process requirements. "Although a trial type hearing and detailed findings of fact are not required, such a statement must evince the Board's consideration of relevant factors. U.S. ex rel. Johnson, supra 500 F. 2d 394." Haymes, supra, p. 544. The theory behind the requirement of a statement is to prevent the denial of parole for an "impermissible" reason or for "no reason" at all. It cannot seriously be argued that Mr. Kinsella was discharged for an "impermissible" reason or for "no reason" at all. The grounds for the decision to discharge Kinsella are apparent and the essential facts from which the inferences have been drawn are fully outlined in the determination of the Board

of Education.

The plaintiff has raised other constitutional questions under the guise of an attack on the "adequacy and sufficiency of the Board of Education determination."

1. The pre-ordained bias of the Board of Education.
2. The multiple role of the Board of Education and its attorney.
3. The fact that the hearing is not before the ultimate decision maker.

These arguments were raised in the initial action for a declaratory judgment. They were found to be without merit. They cannot now be raised in a tangential form to circumvent a failure to appeal because of plaintiff's dissatisfaction with the implementation of the amended regulations of the Commissioner of Education which cured the constitutional defects of the New York State Education Law, Section 3020-a.



### CONCLUSION

The School Board has addressed itself to the narrow issue of the alleged violation of the right of the plaintiff to due process of law as guaranteed by the New York State and United States Constitution. This issue cannot be resolved until this Court determines the threshold questions of jurisdiction and the validity of the amended regulations promulgated by the Commissioner of Education.

We respectfully submit that the School Board was in full compliance with the amended regulations and that the determination of the School Board to dismiss Mr. Kinsella comported with due process of law. There is nothing vague or impermissible about the bases for his discharge. The determination is the product of an extensive hearing which lasted four days and produced over seven hundred pages of transcript. The net result is documented evidence of excessive and unnecessary physical force imposed on students by an individual employed in the capacity of an educator.

We respectfully request that this Court affirm the Order and Judgment dismissing both of the plaintiff's motions for supplementary relief.

Dated: April 9, 1976

Respectfully submitted,  
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April 9, 1976

Re: Kinsella v Board of Education of the Central School Dist No. 7  
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County of Monroe) ss.:  
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